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Anthony Garcia, Respondent/Cross-Petitioner.**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

THE STATE OF UTAH,
Petitioner/Cross-Respondent,

v.

YESHA ANTHONY GARCIA,
Respondent/Cross-Petitioner.

Respondent/Cross-Petitioner is incarcerated

**REPLY BRIEF OF CROSS-PETITIONER
ON CERTIORARI REVIEW**

This writ of certiorari arises from a court of appeals' decision reversing Garcia's conviction for Attempted Murder, a first degree felony, in violation of Utah Code §76-5-203. The cross-petition arises from the court of appeals' decision affirming Garcia's conviction of Possession of a Firearm by a Restricted Person, a third degree felony, in violation of Utah Code §76-10-503, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Robin Reese presiding.

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**FILED
UTAH APPELLATE COURTS**

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INTRODUCTION

Contrary to the State's claim, all of the issues argued in Garcia's Brief of Cross-Petitioner address this Court's "unlawful user" certiorari question and are therefore properly before this Court. Specifically, defense counsel adequately preserved the issues that are directly and fairly contained within this Court's certiorari question, and if not, ineffective assistance of counsel would exist here if trial counsel did not argue that the evidence was insufficient to prove that Garcia was an "unlawful user" under a constitutional interpretation of a vague statutory phrase. In addition, contrary to the State's claim, there was insufficient evidence to show that Garcia was an "unlawful user" when this vague statutory term is applied in a constitutional manner that comports with its plain meaning. Lastly,

Garcia does not concede any matters not addressed in this reply brief but believes that those matters are adequately addressed in his Brief of Cross-Petitioner. *See* Utah R. App. P. 24 (c) (“Reply briefs shall be limited to answering any new matter set forth in the opposing brief.”).

ARGUMENT

I. The court of appeals erred in determining that Garcia failed to demonstrate that the term “unlawful user” is unconstitutionally vague as applied to this case.

The State argues that Garcia’s claims are not properly before this Court because this Court’s certiorari question is not properly before this Court. Br. Cross-Resp. at 18-22. The State also argues that even if Garcia’s claims are properly before this Court, the court of appeals did not err in affirming Garcia’s possession of a dangerous weapon by a restricted person conviction. *Id.* at 37-41. The State is wrong because: A) This Court’s certiorari question is properly before this Court and all of Garcia’s claims are either directly or fairly contained within this Court’s certiorari question; B) If this Court agrees with the court of appeals that Garcia did not adequately preserve his constitutional claim, this Court can reach the merits of this claim under Garcia’s ineffective assistance of counsel claim; and C) There was insufficient evidence to show that Garcia was an “unlawful user” when this vague statutory term is applied in a constitutional manner that comports with its plain meaning.

- A. This Court's certiorari question is properly before this Court and all of Garcia's claims are either directly or fairly contained within this Court's certiorari question.

The State argues that this Court should not decide the merits of Garcia's constitutional claim because the Court's certiorari question is not properly before this Court. Br. Cross-Resp. at 18-20. The State also argues that the court of appeals never decided Garcia's constitutional claim because the court determined that defense counsel did not preserve the issue; therefore, the court only decided Garcia's ineffective assistance of counsel claim. *Id.* at 18-20. The State, however, is mistaken because this Court's certiorari question is properly before this Court. Furthermore, all of Garcia's arguments in his Brief of Cross-Petitioner are either directly or fairly contained within this Court's certiorari question.

First, Garcia's constitutional claim is properly before this Court because the court of appeals' opinion addressed it. In its decision, the court of appeals specifically and incorrectly stated that "The Statute is Not Unconstitutionally Vague." *See Garcia*, 2016 UT App 59, ¶34 (section heading). The court of appeals determined that, because it disagreed with Garcia's constitutional argument that "unlawful user" should be interpreted as "current user," he was not prejudiced by counsel's failure to preserve it. *Id.* ¶35. In rejecting Garcia's constitutional claim, the court of appeals decided that Garcia "points to no cases that limit 'unlawful user' to people actually under the influence of a drug at the time they possess a firearm. And he neglects to cite to any cases in which such an argument was successfully made to a court." *Id.* Because the court of appeals not only addressed

and rejected Garcia's constitutional claim, but did so in a manner that improperly informs Utah trial courts that the statute is not unconstitutionally vague in situations like Garcia's, this Court's certiorari question is properly before this Court.

Second, all of Garcia's arguments in his Brief of Cross-Petitioner are either directly or fairly contained within this Court's certiorari question. "In determining the scope of an order granting certiorari," this Court is "guided by rule 49(a)(4) of the Utah Rules of Appellate Procedure." *State v. Leber*, 2009 UT 59, ¶10, 216 P.3d 964. Rule 49(a)(4) "states that '[o]nly the questions set forth in the petition or *fairly included therein* will be considered by the Supreme Court.'" *Leber*, 2009 UT 59, ¶10 (quoting Utah R. App. P. 49(a)(4)) (emphasis in original). "Questions presented for review within the petition for certiorari 'will be deemed to comprise every subsidiary question fairly included therein.'" *Leber*, 2009 UT 59, ¶10 (quoting Utah R. App. P. 49(a)(4)). "Furthermore, 'this rule should be construed broadly to avoid the rigid exclusion of reviewable issues, however peripheral.'" *Leber*, 2009 UT 59, ¶10 (quoting *Sevy v. Sec. Title Co.*, 902 P.2d 629, 637 (Utah 1995)).

"Review on certiorari is limited to examining the court of appeals' decision and is further circumscribed by the issues raised in the petitions." *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 856 (Utah 1998). But this does not limit this Court's "power to review questions decided by the district court and not reached by the court of appeals, where those questions are fully briefed and fairly

included within the issues being decided upon by this court.” *Nichols v. Jacobsen Const. Co.*, 2016 UT 19, ¶33, 374 P.3d 3 (citing Utah R. App. P. 49(a)(4)).

This Court granted Garcia’s cross-petition for certiorari review on the following issue: “Whether the court of appeals erred in determining Cross-petitioner failed to demonstrate that the term unlawful user in Section 58-37-2 of the Utah Code is unconstitutionally vague as applied to his case.” Order, dated September 29, 2016.¹ Garcia’s Brief of Cross-Petitioner argues that the court of appeals did, in fact, err because it failed to interpret and apply the vague statutory term “unlawful user” in a manner that comports with its plain meaning and in a manner that is consistent with constitutional protections. *See* Br. Cross-Pet. at 30-50; Utah Code §§76-10-503(1)(b)(iii), 58-37-2. Moreover, Garcia argues, and previously argued before the court of appeals, that this issue was preserved by defense counsel’s directed verdict motion. Br. Cross-Pet. at 46-47; R.555:129-34; *see also State v. Garcia*, 2016 UT App 59, ¶16. Garcia also argues that the court of appeals erred in determining that he had failed to prove prejudice for his ineffective assistance of counsel claim. Br. Cross-Pet. at 48-50; *Garcia*, 2016 UT App 59, ¶¶34-38. A proper interpretation and application of “unlawful user” shows that there was insufficient evidence to support that Garcia was an “unlawful user” of a controlled substance. Utah Code §76-10-503(1)(b)(iii).

¹ As pointed out in the State’s brief, the term “unlawful user” is not found in Section 58-37-2 of the Utah Code. Br. Cross-Resp. at 12. Rather, as applied to this case, the term “unlawful user” is found in Section 76-10-503(1)(b)(iii) of the Utah Code.

Ultimately, all of these arguments are either directly or fairly contained within this Court's certiorari question because they address this Court's constitutional question regarding "unlawful user" as well the corresponding subsidiary questions that are related to this issue (i.e. preservation and ineffective assistance of counsel). *See* Order, dated September 29, 2016; *Leber*, 2009 UT 59, ¶10; *Nichols*, 2016 UT 19, ¶33.

Contrary to the State's argument, just because the court of appeals decided that Garcia did not preserve the constitutional claim does not mean that this issue was not properly before the court of appeals, or that this Court is bound by the appellate court's decision regarding preservation. *See State v. Hansen*, 2002 UT 125, ¶25, 63 P.3d 650 (this Court reviews the decisions of the court of appeals for correctness); *see also Eaton Kenway, Inc. v. Auditing Div. of Utah State Tax Comm'n*, 906 P.2d 882, 885 (Utah 1995) (stating that "[t]his [C]ourt is never bound by decisions of the court of appeals and does not need to overcome any particular hurdles in overruling them.") (citation omitted).

In sum, this Court's certiorari question is properly before this Court. Furthermore, this Court can reach Garcia's constitutional claim because it is directly, or at a minimum, "fairly included", *Leber*, 2009 UT 59, ¶10, within this Court's certiorari question and this Court is not bound by the court of appeals' decision that Garcia did not preserve this issue. *See* Order, dated September 29, 2016; *Leber*, 2009 UT 59, ¶10. Thus, in the interests of judicial economy and because Garcia's arguments are directly or fairly contained within this Court's

certiorari question, this Court should address the merits of Garcia's constitutional claim.

- B. If this Court agrees with the court of appeals that Garcia did not adequately preserve his constitutional claim, this Court can reach the merits of this claim under Garcia's ineffective assistance of counsel claim.

According to the State, because Garcia cannot point to any case law that has yet to implement an interpretation of "unlawful user" as meaning someone who is using a controlled substance at the time he or she is in possession of the firearm, Garcia cannot prove that his counsel performed unreasonably. Br. Cross-Resp. at 27-28. The State argues "Garcia's trial counsel was only obligated to argue existing law, not advocate for new law." *Id.* at 28. The State is mistaken because the United States Constitution was existing law, and it would have been unreasonable for defense counsel to not advocate for pertinent issues that have not yet been settled by Utah law (i.e., the appropriate constitutional application of the vague statutory term "unlawful user."). Utah Code §§76-10-503(1)(b)(iii), 58-37-2; *see also* Br. Cross-Pet. at 34-36 (addressing the various constitutional problems that arise if Utah courts apply a broad interpretation of "unlawful user" in outlining the temporal nexus requirements of any drug use and weapon possession).

Defense counsel is tasked with a number of duties. Defense counsel has a duty to "adequately investigate" the law. *State v. Hales*, 2007 UT 14, ¶69, 152 P.3d 321 (citation omitted); *State v. Lenkart*, 2011 UT 27, ¶27, 262 P.3d 1.

Counsel must also make use of important defense evidence and object to inadmissible evidence. *See, e.g., State v. Moore*, 2012 UT 62, ¶¶7-9, 289 P.3d 487 (counsel performed deficiently when he failed to use important defense evidence that he had access to); *State v. Hutchings*, 2012 UT 50, ¶23, 285 P.3d 1183 (failure to object to ambiguity in jury instructions constituted deficient performance).

Counsel's duty also extends to investigating and arguing issues that have not yet been settled by Utah law. In *State v. Eyre*, 2008 UT 16, ¶¶11-21, 179 P.3d 792, this Court held that defense counsel was ineffective for failing to recognize an error even though Utah case law had not yet spoken on the issue. Specifically, "counsel was ineffective for failing to object to the absence of a jury instruction identifying a tax deficiency as an element of" Utah's tax evasion statute. *Id.* ¶14. And "[a]lthough [the] statute [did] not use the words 'tax deficiency', it [was] logical to conclude that, if no tax is owing, there is no tax to evade." *Id.* ¶11. (emphasis added). Likewise, in *State v. Ison*, 2006 UT 26, ¶32, 135 P.3d 864, this Court held that counsel performed deficiently even though the issue presented an "open question" in Utah because "competent counsel would scour the exceptions to the hearsay rule in search of a means" to get the evidence admitted. *Id.* ¶32 (emphasis added).

In short, the question in this case is not whether counsel was obligated to only argue existing law, as is argued by the State. Br. Cross-Resp. at 28. Rather, the question is whether counsel's arguable failure to object to a constitutional

interpretation and application of a vague statutory phrase “unlawful user” constituted a reasonable strategy. *See, e.g., State v. Dunn*, 850 P.2d 1201, 1225 (Utah 1993) (“if the challenged act or omission might be considered sound trial strategy, we will not find that it demonstrates inadequacy of counsel”). Here, there would be no sound strategy for defense counsel to not “scour” the United States Constitution in arguing that it is “logical to conclude” that there cannot be an unconstitutional application of the vague statutory term “unlawful user” even if Utah case law has not yet spoken on this issue. *See Eyre*, 2008 UT 16, ¶11; *Ison*, 2006 UT 26, ¶32; Utah Code §§76-10-503(1)(b)(iii), 58-37-2. Thus, this Court can reach the merits of Garcia’s constitutional claim under his ineffective assistance of counsel claim. Furthermore, ineffective assistance of counsel would exist here if trial counsel did not argue that the evidence was insufficient to prove that Garcia was an “unlawful user” under a constitutional interpretation of a vague statutory phrase. Utah Code §§76-10-503(1)(b)(iii), 58-37-2.

- C. There was insufficient evidence to show that Garcia was an “unlawful user” when this vague statutory term is applied in a constitutional manner that comports with its plain meaning.

Garcia’s Brief of Cross-Petitioner argues that in applying a constitutional and narrow interpretation of “unlawful user” to mean someone who is actually using a controlled substance at the time he or she is in possession of the firearm, there was insufficient evidence to support Garcia’s firearm conviction. Br. Cross-Pet. at 44-45. In the alternative, even under the federal circuits’ standard, which requires “recency of [drug] use” and that the use be proximate to or

contemporaneous with the possession of a firearm, there was insufficient evidence to support Garcia's firearm conviction. *Id.* at 45-46.

The State appears to acknowledge that the federal definition of "unlawful user" is correct. Br. Cross-Resp. at 40. In other words, the State concedes that the statute would be vague unless "it is defined to require use 'sufficiently consistent and prolonged as to constitute a pattern of regular and repeated use... during a period that reasonably covers the time a firearm was possessed.'" *Id.* (quoting *United States v. Burchard*, 580 F.3d 341 (6th Cir. 2009)). The State argues, however, that an application of the federal standard to the facts of this case shows that Garcia was an "unlawful user" because "Garcia admitted that he [] started using cocaine in 2006 [] [a]nd nothing in Garcia's statements even begin to suggest that Garcia had since stopped." *Id.* at 37. The State is mistaken.

Garcia's confession to "sometimes" using cocaine "since 2006" was insufficient to show that he was a *regular user* of cocaine when he possessed the gun on or about June 30, 2010. *See* State's Ex.21. Indeed, the confession is consistent with Garcia having used cocaine once or twice since 2006. It is also consistent with him not having used cocaine for a year or more. That would hardly constitute regular, ongoing cocaine use at a time proximate to Garcia's weapon possession. Moreover, Garcia specifically informed a detective that he keeps his gun close by when he is "off cocaine," which indicates periods of time when Garcia is not using cocaine, and most importantly, suggests that Garcia was not using cocaine on June 30, 2010. *See id.* Thus, contrary to the State's claim,

Garcia's statements to a detective indicated that he did not have ongoing cocaine use since 2006 and that he specifically chooses to possess a weapon when he is not using drugs. *See id.* And even if Garcia's statements are interpreted as him confessing to *sometimes* simultaneously possessing a gun and using cocaine, this does not prove that he was a regular user of cocaine when he possessed the gun on June 30, 2010. *See State v. Simmons*, 759 P.2d 1152, 1154-55 & n.2 (Utah 1988) (holding that the evidence was insufficient to convict the defendant of rape for conduct that allegedly occurred "on or about the 5th day of May, 1985," even though there was "ample evidence of other incidents of rape committed upon the same victim").

The State unpersuasively attempts to distinguish *United States v. Doughty*, No. 2:09-CR-62-WKW [WO], 2009 WL 2132701 (M.D. Ala. July 14, 2009) (unpublished), on the ground that Garcia used the present tense regarding his drug use and the defendant in *Doughty* used the past tense. Br. Cross-Resp. at 34. But the defendant in *Doughty* did not use the past tense. *See Doughty*, 2009 WL 2132701, at *1. The court's decision used the past tense when paraphrasing the defendant's confession because the court was referring to events in the past. *See id.* (stating that when the defendant spoke to a police officer, he "allegedly *responded* that *he smoked* marijuana for his back problems.") (emphasis added). If the defendant had used the past tense, the court would have used the pluperfect or past perfect tense to paraphrase his confession (i.e. "that he *had* smoked marijuana" as opposed to "he smoked marijuana").

Ultimately, Garcia's statements lacked any indication of regular, ongoing, and recent drug use that was proximate in time to his weapon possession. *See* Br. of Cross-Pet. at 41-42; *Cf. United States v. Torres-Rivera*, Criminal No. 15-481 (PAD), 2016 WL 3024061, at *2, *3 (D. P.R. May 24, 2016) (unpublished) (defendant was an "unlawful user" because he admitted to smoking marijuana on a weekly basis, dependent upon how often he could get it); *United States v. Holmes*, No. 15-CR-129, 2016 WL 54918, at *1 (E.D. Wis. Jan. 5, 2016) (unpublished) (defendant was an "unlawful user" where he "admitted in a post-arrest statement that he habitually smoked marijuana for the past four years, that he smoked marijuana at least a couple of times per day, and that he smoked marijuana earlier on the day he was arrested.") (footnote omitted); *United States v. Marceau*, 554 F.3d 24, 31 (1st Cir. 2009) (defendant was an "unlawful user" where he told an officer that he "had smoked marijuana daily in the days before [he possessed weapons in a] robbery, stopping only when he exhausted his supply...").

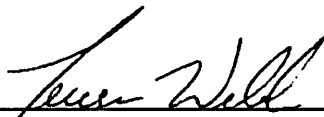
In sum, the court of appeals erred in affirming Garcia's third degree conviction for possession of a firearm by a restricted person because it failed to interpret the vague statutory phrase "unlawful user" in a constitutional manner that comports with its plain meaning. In addition, when applying a constitutional interpretation of "unlawful user" to this case, there was insufficient evidence to support Garcia's possession of a firearm charge. The appellate court's decision to affirm the firearm conviction therefore provides trial courts with unclear,

incorrect, and unfair guidance in interpreting and applying the phrase “unlawful user” in a constitution manner that comports with its plain meaning. *See* Utah Code §§76-10-503(1)(b)(iii), 58-37-2. Thus, this Court should reverse the court of appeals’ ruling that affirmed Garcia’s conviction for possession of a firearm by a restricted person.

CONCLUSION

For the reasons given above and in Garcia’s Brief of Respondent and Cross-petitioner, Garcia respectfully requests that this Court affirm the court of appeals’ ruling reversing his attempted murder conviction due to an erroneous and prejudicial jury instruction regarding the relationship between attempted manslaughter and imperfect self-defense. Garcia further requests that this Court reverse the court of appeals’ ruling that affirmed Garcia’s possession of a weapon by a restricted person.

SUBMITTED this 5th day of April, 2017.



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Attorney for Respondent/Cross-Petitioner

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 3,129 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.



TERESA L. WELCH

CERTIFICATE OF DELIVERY

I, TERESA L. WELCH, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Supreme Court, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Supreme Court at supremecourt@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@utah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 5th day of April, 2017.



TERESA L. WELCH

DELIVERED this _____ day of April, 2017.
